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February 11, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 92-266

Dear Ms. Searcy:

Enclosed for filing in the above-captioned proceeding are an original and nine copies of the Reply Comments Of Austin, Texas; Dayton, Ohio; Dubuque, Iowa; Gillette, Wyoming; Miami Valley, Ohio; Montgomery County, Maryland, St. Louis, Missouri; and Wadsworth, Ohio.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

MILLER & HOLBROOKE

By Nicholas P Miller
Nicholas P. Miller

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Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

REPLY COMMENTS OF
AUSTIN, TEXAS; DAYTON, OHIO; DUBUQUE, IOWA;
GILLETTE, WYOMING; MIAMI VALLEY, OHIO;
MONTGOMERY COUNTY, MARYLAND;
ST. LOUIS, MISSOURI; AND WADSWORTH, OHIO

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February 11, 1993

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SUMMARY

The initial comments filed by this Coalition and others -- including, for example, NATOA, the NLC, NAB, and CFA -- demonstrate that cable rates are too high now and should be reduced. The cable industry cannot and does not convincingly challenge the fundamental points on which those comments rest: that cable is and for years has been a monopoly and enjoys substantial market power over consumers.

Instead, the thrust of the industry's argument is that the Commission should leave rates about where they are now. This argument requires the Commission to ignore the plain language of the statute, and to adopt a regulatory method that is at once complicated, obscure, expensive and ineffective. The proposals should be rejected on statutory grounds, and because they are unworkable.

The Commission should instead adopt rate regulation procedures that provides immediate relief to consumers. The initial comments support the position of the Coalition that it would be reasonable to establish a benchmark for basic and expanded basic service not to exceed $0.32 per channel. However, the comments also suggest that the Commission should begin to develop a cost-based benchmark system for regulating rates. Over time, such a method will provide the proper incentives, while avoiding some of the major pitfalls of the price-based benchmarks the industry asks the Commission to adopt.

In addition, the Commission should make it clear that (1) rates for equipment used in the provision of basic service are

subject to regulation; (2) operators should be prohibited from itemizing franchise fees and other amounts as an "add-on" to subscriber bills; and (3) the Commission should not exempt small systems from regulation.

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In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket No. 92-266

REPLY COMMENTS OF
AUSTIN, TEXAS; DAYTON, OHIO; DUBUQUE, IOWA;
GILLETTE, WYOMING; MIAMI VALLEY, OHIO;
MONTGOMERY COUNTY, MARYLAND;
ST. LOUIS, MISSOURI; AND WADSWORTH, OHIO

These reply comments are filed on behalf of a Coalition of communities: Austin, Texas; Dayton, Ohio; Dubuque, Iowa; Gillette, Wyoming; Miami Valley, Ohio; Montgomery County, Maryland; St. Louis, Missouri; and Wadsworth, Ohio ("Coalition"). The Coalition filed initial comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in this docket. These reply comments supplement that filing, based upon comments filed by others in the docket. Coalition members vary in size, but each is prepared to regulate cable subscriber rates, and believes effective cable rate regulation is necessary to protect consumers.

The cable industry posits that Congress did not intend to have rates reduced. Accordingly, the industry submits proposals that will not result in any meaningful reduction in rates. The industry wants to leave basic rates at or near existing levels; it wants to virtually preclude any regulation of non-basic programming and most equipment; it wants to be able to offset any decrease in basic rates with increases in rates for non-basic tiers (thus shifting, but not eliminating monopoly rents); and it wants procedures that are complex and will discourage any regulation to begin with.

By contrast, every commenter, other than industry commenters, argues that Congress intended for rates to be reduced to reasonable levels. Different approaches are proposed, but the commenters generally conclude that basic and non-basic tier rates are now 30-50% too high. These commenters also propose procedures that are designed to allow franchising authorities and the Commission to regulate effectively.

For all the paper that has been filed in this docket, the issue before the Commission thus involves a simple choice: will FCC regulations provide consumers relief from high cable rates, beginning on April 3 and afterward, or not?

We show below, first, that Congress intended consumers to obtain relief, and that none of the industry's proposals meet the demands of the statute; hence they must be rejected. Second, we show that the rate regulation proposal of the Coalition does satisfy the commands of the statute and will result in fair and appropriate relief, and that industry criticisms of related approaches are unfounded.

I. THE CABLE INDUSTRY'S PROPOSALS REQUIRE THE FCC TO IGNORE UNAMBIGUOUS CONGRESSIONAL MANDATES

A. Congress Envisioned Significant Reductions in Existing Rates

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. at 1460 (to be codified in scattered sections of 47 U.S.C.) ("CPCA" or "Act") to protect consumers (and video programmers) against market power abuses by the cable industry.[1] Chief among those abuses was the widespread practice of charging unjustifiably high rates in franchise areas where the operator faced no competition. Congress ordered the FCC to establish regulations that "ensure that rates for the basic service tier are reasonable" and that reduce any unreasonable rate for cable programming services.[2]

The cable industry urges the FCC to establish regulatory procedures that permit cable operators to continue to collect monopoly profits. In essence, the industry asks the FCC to design regulations that will (1) perpetuate already-excessive basic service rates, and (2) effectively leave unregulated all or nearly all non-basic rates. This is not what Congress had in mind.

There is no reasonable construction of the Act that does not include rollbacks of regulable cable rates that incorporate

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1 Sec. 2(a)-(b), 106 Stat. at 1460.

2 Hereafter, the terms "non-basic service" and "expanded basic service" are used interchangeably to refer to "cable programming services" as defined in Sec. 623(l)(2) of the Act, 106 Stat. at 1470-71.

monopoly profits. Congress' directive was express and unambiguous: basic rates must be reasonable, and non-basic rates must be rolled back if they are unreasonable.[3]

Congress recognized that cable subscribers are paying too much for cable service in areas where there is no competition. Congress further recognized that broadcast television, by its nature, is different from cable, and does not serve as a competitive alternative. See, e.g., 138 Cong. Rec. S413 (daily ed. Jan. 27, 1992) (statement of Sen. Danforth). Thus, the Act is designed to ensure effective rate regulation for both basic and non-basic tiered services.

Some cable companies nonetheless have postulated that Congress was concerned primarily with ensuring reasonably-priced access to broadcast programming, because that programming is "an important source of news, public opinion and entertainment," suggesting that access to broadcast programming is more important than access to other types of programming. The Economics of

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[3] Under the Act, an operator can implement an increase in non-basic rates before the rates are approved by a franchising authority, subject to review on complaint. Congress made it clear that the FCC could order refunds of rates for non-basic services charged during the pendency of any proceeding to determine whether the rates were unreasonable. It did so out of concern that the FCC might otherwise think that its authority to consider complaints was limited to ordering prospective relief at the end of a proceeding. S. Rep. No. 92, 102d Cong., 1st Sess. 75 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1208 ("Senate Report"). There was no likelihood of such confusion with respect to basic rates because basic rate regulation can occur on the locality's own initiative and indeed rate issues can be resolved before a rate even goes into effect. The mandate that basic service rates must be reasonable cannot be accomplished without rate rollbacks; it would be odd indeed to suppose that non-basic rates could be reduced, but not basic rates.

Cable Television Regulation, prepared for Time Warner Entertainment Company, L.P. by Daniel Kelley, Hatfield Associates, Inc., January 27, 1993 (hereafter "Time Warner Study") at 10-11.

The argument rests on a hypertechnical (and incorrect) reading of the statute, a selective review of comments of a few legislators, and a decided indifference to the history of the CPCA. The cable industry argues that the legislation contemplates that expanded basic rates can include monopoly rents because the statute directs the Commission to reduce rates which are "unreasonable" instead of directing the Commission (as it does in the case of basic rates) to set rates that are "reasonable." § 623(b)(1), (c)(1), 106 Stat. at 1465, 1468. In fact, the terms "reasonable" and "unreasonable" are typically used interchangeably in regulatory statutes, an unreasonable rate by definition being one which is not reasonable. See, e.g., Federal Power Act of 1920 § 205, 16 U.S.C. § 824d (rates and charges must be just and reasonable) and § 206, 16 U.S.C. § 824e (if Commission, on complaint, finds rate is unreasonable, it may set reasonable rate); Communications Act of 1934 § 201, 47 U.S.C. § 201 (all charges must be just and reasonable; charges that are unjust and unreasonable are unlawful). In the Federal Power Act, the terms "reasonable" and "unreasonable" merely distinguish between actions to decide whether a proposed rates is appropriate and actions on the agency's own motion or complaint. The same is true here.

The fact that the Act indicates that the Commission must consider somewhat different factors in establishing basic and non-basic rates does not require a different conclusion. First, the overriding intent of both basic and non-basic regulation is to set and maintain rates that are reasonable and prohibit rates that are "unreasonable". As noted above, these are the flip sides of each other. Second, the factors that the Commission is required to consider in establishing rates are similar, and indeed one of the factors to be considered in regulating both basic and non-basic service is the level of rates in communities facing effective competition. In fact, the Senate Report explains that "unreasonable" rates "are those that are above those that would occur under effective competition."[4] Moreover, it is clear (and the industry does not dispute) that the factors set forth in the Act need not all be weighted equally, and the FCC may consider additional factors. Thus, the various factors set forth in Section 623(b) and (c) do not lead to the conclusion urged by the industry, that non-basic rates are to be loosely regulated.[5]

The industry also claims that Congress' only concern in regulating non-basic rates, was to "rein in" the minority of

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4 Senate Report at 75, 1992 U.S.C.C.A.N. 1208.

5 As the Coalition pointed out in its initial comments, there is a difference in the standard to be applied in regulating basic and non-basic rates, but it does not lead to loose regulation of expanded basic rates. Both basic and expanded basic rates must be reasonable, but in addition, basic rates should be no higher than what would be charged in competitive markets -- in some cases, the nominal cost of the product.

"renegades". Hence, (some industry commenters argue) the FCC should merely review the highest two to five percent of expanded basic rates; all other expanded basic rates should be irrefutably deemed reasonable.

In support of its position, the industry cites various statements by Congressmen that the purpose of § 623(c) is to rein in the bad actors. However, these statements do not aver that only a minority of the industry are bad actors. To the contrary, they recognize that excessive rates are even more rampant for the most popular basic tiers than for the lowest priced basic tiers. 138 Cong. Rec. S14223 (daily ed. Sept. 21, 1992) (statement of Sen. Inouye). There is no evidence that Congress ultimately decided that regulation of non-basic services should be minimal, nor that the majority of existing non-basic rates were not unreasonable.[6]

Moreover, the industry's arguments ignore the history of the CPCA, which makes it clear that the industry fought -- and lost -- the "bad actor" argument in Congress. In 1989, Senator Danforth introduced S.1880, an early version of the bill that went on to become the CPCA. The bill, as passed by the Senate Commerce, Science and Transportation Committee, included a

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[6] To the contrary, the recognition that less than one half of one percent (53 out of 11,000) cable communities have a competing franchise (Senate Report at 8, 1992 U.S.C.C.A.N. 1141), combined with the recognition that consumers need to be protected against the cable industry's undue market power § 2(a)(2) and (b)(4)-(5), 106 Stat. at 1460, 1466-1467, strongly indicates that all but a handful of current rates should be presumed to be unreasonable. See also House Report at 30 (stating that competitors to cable serve fewer than 5 percent of all households).

provision that directed the FCC to determine whether a rate for a cable programming service was "significantly excessive." S. 1880, 101st Cong., 1st Sess. (1989). The Commission would only establish reasonable rates if it found the "significantly excessive . . . rates cannot be justified under reasonable business practices," a test that seems designed to target only the worst actors in the industry. S. 1880, 101st Cong. 2d Sess. § 5(c)(1). A similar provision was included in early drafts of a House of Representatives substitute for S. 1880 (House of Representatives Subcommittee on Telecommunications and Finance, Committee Staff Draft, June 5, 1990) (FCC can regulate significantly excessive rates), but by the time it was passed, Congress had made it clear that any unreasonable rate was to be reduced. Moreover, Congress had eliminated requirements that a complainant make a prima facie showing that rates were unreasonable, a further indication that Congress desired effective and complete protection for consumers.

The industry also asserts that it must be allowed significant latitude to set expanded basic rates because excessive regulation of expanded basic tiers will likely result in a reduction of services, with no corresponding reduction of market power.[7] According to the National Cable Television Association, Inc. ("NCTA"), "Capping prices of a seller that supposedly possesses market power will not effectively eliminate excess profits if the seller is able simply to reduce its costs

[7] NCTA Comments at 56-57.

and offer an inferior product at the regulated price." NCTA Comments at 56. In other words, the industry argues that the Commission should give it the legal right to charge excessive rates, because otherwise it will act to evade any rate regulations imposed. This hardly follows. The conclusion must instead be that the FCC must take special care to craft its rate regulations tightly, and that over time, rates cannot be evaluated completely apart from consideration of costs and quality of service. The Act specifically requires that "capital and operating costs, including the quality and costs of the customer service provided", be considered in determining whether a non-basic rate is unreasonable. § 623(c)(2)(E), 106 Stat. at 1469.

The industry also suggests that "over-regulation" will stifle advances in programming and technology, and that this is a particular concern with respect to non-basic rate regulation. However, contrary to industry claims,[8] there is little evidence either that regulation prior to 1986 hindered cable development, or that deregulation significantly accelerated advances in the industry.[9]

In any event, such non-statutory arguments and related arguments regarding administrative efficiency, discussed below, miss the point: they cannot justify lax regulation. There is

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[8] See, e.g., TCI comments at 7.

[9] Comments of Consumer Federation of America ("CFA") at 40-69 provide a detailed rebuttal to these claims.

every indication that Congress wanted effective regulation of basic and non-basic tiers. Members of Congress recognized that very few people choose to receive only the lowest level of basic service.[10] The Act is not intended to limit regulatory relief to a tiny proportion of cable subscribers. Rather, Congress concluded that cable operators have monopoly power in the vast majority of communities, and that that market power extends to (and is particularly powerful with respect to) "expanded basic" type services. Three or six or even more over-the-air television broadcast signals do not offer competition to these programming services. Congress recognized that non-basic tier rates prior to the effective date of § 623 were very likely unreasonable, and should not be allowed to continue. § 623(c)(1)(C), 106 Stat. at 1468. See also, Senate Report at 75, 1992 U.S.C.C.A.N. 1208. The "rate solution" crafted by the industry is thus not a solution that can be adopted consistent with the statute.

B. The Act Does Not Require or Evidence a Preference for a Stripped-Down Basic Tier

The cable industry claims that the CPCA allows operators to move all programming other than broadcast and public, educational and governmental ("PEG") access channels from basic to non-basic tiers, and at least one commenter suggests that the Act may require an operator to offer such a stripped-down basic tier.[11] This position is critically related to the operators' general

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[10] 138 Cong. S413 (daily ed. Jan. 27, 1992) (statement of Sen. Danforth); Id. at S423 (statement of Sen. Gore).

[11] Continental Cablevision comments at 2.

position that expanded basic rates are to be regulated loosely. If that is the case, then operators can continue to earn all the monopoly profits they earn now by shifting programming out of basic service (to make it a tier that cannot attract consumers) and into expanded basic, which would then be sold for an increased price. TCI has already done precisely this, in anticipation of the adoption of the FCC's regulations. In order to accomplish its goals, the FCC must either require or permit operators to re-tier, without regard to existing franchise agreements. However, just as the Act does not support the operator's claim that expanded basic should be regulated loosely, neither the Act nor the legislative history supports the assertions that operators are entitled or required to offer a stripped-down tier of service.

First, the Act clearly states (and the industry does not attempt to claim otherwise) that basic service may include other services. The broadcast and PEG channels are merely the minimum components of basic service tiers. § 623(b)(7), 106 Stat. at 1467. While it is true that the Act is designed to guarantee subscribers access to a reasonably-priced basic service, nothing indicates that the purpose of the Act is hindered if more services are included on basic tiers than broadcast and PEG access services.

In fact, the legislative history makes apparent that Congress wanted basic service to include broadcast signals, "and other programming of interest" to subscribers. H.R. Rep.

No. 628, 102d Cong., 2d Sess. 80-81 (1992). The programming of greatest interest to subscribers plainly is not available on stripped-down or "lifeline" basic service tiers. Very few subscribers receive the stripped-down basic tier. Fewer than ten percent take the "lifeline" basic service. 138 cong. Rec. S413 (daily ed. Jan. 27, 1992) (statement of Sen. Danforth).[12]

Congress recognized that, in response to the FCC's revised definition of "effective competition," and in anticipation of federal legislation, cable operators were moving services off of basic tiers in an effort to evade rate regulation. H.R. Conf. Rep. at 65, reprinted in 1992 U.S.C.C.A.N. 1231, 1247 ("House Conf. Report"). Congress concluded such retiering was unacceptable, and the Act requires the FCC to establish regulations that will vitiate the effects of such attempted evasions. § 623(h), 106 Stat. at 1470. The conference report notes that a reference to retiering was added to the Act as a specific type of evasive practice Congress wanted to prohibit. House Conf. Rep. at 65, 1992 U.S.C.C.A.N. at 1247. "The conferees expect the Commission to adopt procedures to protect consumers from being harmed by any such evasions." Id. The

[12] Subscription to lifeline tiers may actually even be significantly less. In Montgomery County, Maryland, less than about 2.5 percent take the lowest-level basic service, and in St. Louis, Missouri, less than 2 percent subscribe only to that tier.

cable industry's claim that such retiering is allowed or even required flies in the face of the plain language of the Act.[13]

Because nothing in the Act advocates, let alone requires, basic service to consist only of broadcast and PEG programming, franchise agreements that require additional services to be included on basic service are not preempted or invalidated by the CPCA. While NCTA recognizes that franchise requirements regarding basic service offerings continue to be enforceable,[14] other cable companies claim that such requirements are preempted.[15] They argue that additional services on basic tiers can be included at the operator's discretion, but cannot be required.[16] There is no policy reason to adopt such a distinction. Nor does the language of the Act warrant such a conclusion. While it provides that the operator "may add" additional signals or services to basic, it does not mean that such additions may not result from franchise obligations.[17]

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[13] The industry attempts to limit the prohibition on rate evasions to instances of evading a particular rate. However, Sec. 623(h), 106 Stat. at 1470 also applies to attempts to evade regulation altogether. House Conf. Rep. at 65, 1992 U.S.C.C.A.N. at 1247.

[14] NCTA comments at 37-38.

[15] See e.g., TCI comments at 67.

[16] Time Warner comments at 13, Continental comments at 12.

[17] In fact, Congress rejected language in an earlier version of the legislation, H.R. 1303, 101st Cong., 1st Sess. (1991)(unenacted), that specifically preempted franchise requirements imposing basic service obligations. The January 14, 1991 version of the Senate bill likewise included such language, S. 12, 102d Cong., 1st Sess. (1991)(unenacted) § 623(b)(3).

§ 623(b)(7), 106 Stat. at 1467. And such a distinction is inconsistent with the claims of the industry that all rate regulation agreements, whether entered into before or after July 1, 1990, should remain in effect and are not preempted.[18]

Likewise, neither express nor implied provisions in the Cable Act, as amended by the CPCA, prevent operators from providing more than one basic service tier. To the contrary, any tier that contains over-the-air broadcast television signals remains a basic service tier. 47 U.S.C. 522(2) The CPCA merely requires that PEG services required by the franchise also be included on basic tiers. The buy-through prohibition is not violated if an operator offers more than one basic service, as long as subscription to non-basic tiers is not required in order to obtain premium programming. § 623(b)(8), 106 Stat. at 1467-1468. As the Coalition pointed out in its initial comments, several basic service tiers can be offered consistent with the CPCA.

There is no policy reason to limit provision of basic service to a single tier. To the contrary, allowing multiple

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[18] See, e.g., Time Warner comments at 93-94. The industry's position of some operators, that rate regulation agreements are fully enforceable, except that the operator may remove all services other than PEG and broadcast programming, is indefensible. According to the industry, an operator could require a franchising authority to continue to allow a specific, negotiated rate, even though the operator may have removed half of the services originally promised in exchange for the rate. If, as Time Warner argues, contracts remain in effect, then the operators must continue to bear the burdens, along with the benefits of the contracts. See Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1091-92 (3rd Cir. 1988).

tiers of basic service preserves the integrity of existing contracts, extends regulatory protection against excessive rates, while providing subscribers more options, and it solves, at least in part,[19] the regulatory evasion issues.

C. The Regulatory Methods Proposed by the Industry Will Not Effectuate the Goals of the Act

1. The Methods Proposed by the Industry Do Not Satisfy the Requirements of the Act

Comments filed by multiple system operators ("MSO"s) and cable industry associations set forth a number of proposals for regulating basic and non-basic rates. The industry overwhelmingly voices a preference for benchmark regulation rather than cost of service regulation, although the proposed methods for setting a benchmark vary somewhat.

The key common element - and the greatest flaw - in the rate-setting methods proposed, however, is that the benchmarks are based (at least in part and in some cases totally) on existing prices.

The best methods for setting benchmarks, according to the industry, are existing cable rates,[20] and rates in systems facing competition,[21] or some combination of the two.[22] The

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[19] Under the Coalition's approach (see initial comments at 73-75), the basic service that an operator provided as of October 5, 1992 (the date of the passage of the CPCA) would be regarded as basic service for purposes of rate regulation, regardless of retiering that may have occurred after October 5.

[20] See, e.g., Comments of Adelphia Communications Corporation, et al. at ii.

[21] See, e.g., NCTA comments at 16.

industry recommends that if competitive rates are relied upon, they be adjusted upward to counteract "artificially low" rates resulting from greenmailing.[23]

The suggestion that benchmarks should be set based in any respect on current cable rates is directly at odds with Congress' mandate that rates be reasonable and competitive.[24] As already discussed, Congress enacted the CPCA out of a recognition that cable rates are excessively high, due to the noncompetitive cable environment in most communities. The CPCA was created to get rid of excess rates; using existing, monopoly rates as benchmarks protects and entrenches the very excesses Congress sought to eliminate.

The industry's justification for setting future rates based upon existing rates rings hollow. Some industry commenters suggest that Congress was wrong, that there is no need for the regulation set forth in the Act because competitive market forces prevail.[25] One MSO asserts that there is little evidence that Congress wanted to reduce existing rates.[26] NCTA, however, concedes that Congress "may have intended" that basic rates be

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22 See, e.g., Comments of NCTA at 16-19; comments of Continental Cablevision at 30-33.

23 See Comments of NCTA at 16-19.

24 See Smith & Katz, Analysis of Cable Television Rate Models and Proposal for Development of Cost-Based Industry Norms, p. 6, Attachment 1 to the Coalition's initial comments ("Smith & Katz").

25 Time Warner comments at 2.

26 Continental Cablevision comments at 1-2.

set at the "presumably lower rates of systems facing effective competition . . . ."[27]

The industry notes that, while there have been significant studies regarding cable rate increases, there is very little evidence concerning cost increases,[28] apparently suggesting, without providing support, that rates must somehow be justified by costs. However, the cost evidence that does exist offers no support for the industry's common cry that increased rates have been necessitated by corresponding cost increases.[29] Increases in rates have exceeded increases in costs of providing cable services.[30]

The industry also claims that cable's popularity and increased penetration levels demonstrate that either rates prior to 1986 were artificially low, or that rates following deregulation were not artificially high.[31] This conclusion ignores the realities of the cable industry during that period.

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27 NCTA comments at 56 (emphasis added).

28 Continental Cablevision comments at 1-2.

29 See Reply Attachment 1 to these Reply Comments, Smith & Katz "Analysis of Comments to the Federal Communications Commission in Response To Notice Of Proposed Rulemaking To Implement Rate Regulation Section Of The Cable Television Consumer Protection Act of 1992, pp. 10-11 ("Smith & Katz Comment Analysis").

30 Senate Report at 10, 1992 U.S.C.C.A.N. at 1142. The Senate's conclusion is confirmed by comments filed by Time Warner, Inc. in MM Docket No. 89-600 (March 1, 1990). Time Warner's comments showed that total capital and programming costs per subscriber per month increased only about $0.75 over the period 1986-1989.

31 NCTA comments at 21-22.

First, the fact that, prior to 1986, penetration may have been low does not lead to the conclusion that rates must have been unreasonably low. We know of no economic theory whereby consumers decline to take a service because it is underpriced. Likewise, the fact that consumers continued to take cable in face of price increases merely proves how valuable cable has become and why it is important to regulate rates: cable has monopoly control over valuable communications resources.

Indeed, industry studies submitted in this docket explains that cable operators can be expected to abuse this power. A study submitted by Time Warner points out that individual firms have little incentive not to price based on market forces."[32] Time Warner points out that all businesses maximize profits, whether or not they are monopolists.[33] It follows that if the "market" is a monopoly, the firm will charge monopoly prices. Other industry statements reaffirm this point. A study submitted by TCI points out that subscribers are willing to pay $12 billion for non-broadcast programming, despite the fact that they spend the bulk of their time watching broadcast programming.[34]

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[32] Time Warner study at 21 and 31.

[33] Time Warner comments at 25.

[34] TCI study at 13-14. The study does not assert that the willingness to pay these sums is any indication that the prices charged are reasonable. In fact, the study points out that, absent consideration of cost, there is no way to know whether rates are a reflection of market power or of service quality.